

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

ERIC PETRY

CIVIL ACTION NO. 05-0705-LO

VS.

SECTION P

WARDEN GARY COPES, ET AL.

JUDGE MELANÇON

MAGISTRATE JUDGE METHVIN

REPORT AND RECOMMENDATION

Before the court is the civil rights complaint of *pro se* plaintiff Eric Petry filed *in forma pauperis* on April 21, 2005 pursuant to the provisions of 42 U.S.C. §1983. Petry is an inmate in the custody of Louisiana’s Department of Public Safety and Corrections. He is incarcerated at the South Louisiana Corrections Center (SLCC) in Basile, Louisiana. Plaintiff contends that he was subjected to cruel and unusual punishment at that institution between January 12, 2005 and March 14, 2005. Plaintiff names SLCC Warden Gary Copes and Lt. Donna Bertrand as his defendants. He prays for compensatory and punitive damages for “...pain and suffrage [sic], mental anguish and stress...”

On July 21, 2005, the undersigned completed initial review and authored a Report recommending dismissal of plaintiff’s complaint pursuant to the provisions of 42 U.S.C.

§ 1997e(e).¹

¹ Among other things, the Report noted, “42 U.S.C. § 1997e was amended by the Prison Litigation and Reform Act of 1996. Under the current version of the statute, prisoners are barred from recovering monetary damages for mental or emotional injuries ‘unless there is a prior showing of physical injury.’ *Crawford-el v. Britton*, 523 U.S. 574, 596, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). The ‘physical injury’ required by § 1997e(e) must be more than *de minimis* but need not be significant. *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir.1999) (citing *Siglar v. Hightower*, 112 F.3d 191 (5th Cir.1997). Plaintiff has not demonstrated nor even alleged that he suffered from any physical injury, therefore his claim for monetary damages is legally without merit. See *Herman v. Holiday*, 238 F.3d 660, 666 (5th Cir.2001) (holding that a plaintiff was not entitled to money damages as a matter of law on his claim for mental and

On August 1, 2005 plaintiff submitted written objections to the Report and Recommendation. [Doc. 8] Plaintiff claimed, “[42 U.S.C. § 1997e] doesn’t effect Plaintiff’s claim because ... [a]s a result of the Defendant’s actions Plaintiff suffered and is still suffering from a very bad case of arthritis in his left shoulder, from being exposed to these very cold and harsh weather conditions without the proper clothing.” [Doc. 8 at p. 3]

On August 10, 2005, the Court remanded the complaint “...for further report and recommendation on the issue of whether petitioner has failed to state a viable claim under 42 U.S.C. §1983, in light of petitioner’s claim of physical injury, i.e. arthritis, apparently alleged for the first time in his objection to the Report and Recommendation...” [Doc. 9]

LAW AND ANALYSIS

Plaintiff claims that the defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. He complains that he was not issued a jacket upon his entry into the SLCC on January 12, 2005 and, that as a consequence, he was forced to endure uncomfortably cold conditions as he walked from his dormitory to the inmate dining hall for meals three times a day during the relevant time period.

Plaintiff now claims that this circumstance caused him to suffer “...a very bad case of arthritis in his left shoulder, from being exposed to these very cold and harsh weather conditions without the proper clothing.” [Doc. 8 at p. 3]

Assuming plaintiff’s version to be true, as the court is required to do on initial review, he

emotional stress due to an increased risk of illness, cold showers, cold food, unsanitary dishes, insect problems, inadequate clothing, and the presence of an open cesspool near the housing unit because he did not allege any physical injuries resulting therefrom); *Harper*, 174 F.3d at 719 (finding that a prisoner complaining about his placement in administrative segregation failed to demonstrate a physical injury as required by §1997e(e) sufficient to support a claim for monetary damages).” [See Doc. 6 at p. 5]

still fails to state a claim for which relief may be granted. As stated in the original Report, plaintiff failed to allege any physical injury which resulted from the defendants' actions. As further noted, 42 U.S.C. § 1997e(e) provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." The Fifth Circuit in *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir.1997), held that § 1997e(e), excludes from Constitutional recognition a *de minimis* injury. In *Siglar, id.*, the injury complained of was a sore bruised ear which lasted for about three days. The court found such an injury to be *de minimis* and denied recovery under § 1997e(e).

The court in *Siglar v. Hightower, supra* offered no definition of *de minimis* physical injury. It has, however, been suggested that "...an appropriate *de minimis* standard would be whether as a common-sense category approach to the injury; would the injury require or not require a free world person to visit an emergency room, or have a doctor attend to, give an opinion, diagnosis and/or medical treatment for the injury? In effect, would only home treatment suffice?" *Luong v. Hatt*, 979 F.Supp. 481, 486 (N.D. Tex. 1997). A more than *de minimis* physical injury, as defined by § 1997e(e) and the jurisprudence, "... is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks. People in the regular and ordinary events and activities in their daily lives do not seek medical care for the injuries they receive unless it obviously appears to be of a serious nature, or persists after home remedy care." *Id.* [emphasis supplied] See also *Cain v. Commonwealth of Virginia*, 982 F.Supp. 1132, 1135 n. 3 (E.D.Va.1997) (headaches causing vision loss and

requiring pain medication as well as numbness, joint pain and stomach cramps did not constitute physical injury within scope of § 1997e(e)); *Pinkston-Bey v. DeTella*, 1997 WL 158343, at *3 (N.D.Ill. Mar.31, 1997) (severe headaches not physical injury). The statute's use of the words "physical injury" suggests that there must be some actual harm to the plaintiff, and that the harm must be bodily in nature. *Leon v. Johnson*, 96 F.Supp.2d 244 (W.D.N.Y., 2000).

Even though the plaintiff's Objection alleges that the failure of the defendants to supply him a jacket caused him to suffer "...a very bad case of arthritis in his left shoulder, from being exposed to these very cold and harsh weather conditions without the proper clothing" [Doc. 8 at p. 3] that allegation is conclusory, at best, and contrary to the latest scientific findings. For examples, see Medininenet – "Whether Weather Affects Arthritis," by William C. Shiel, Jr., MD, FACP, FACR at <http://www.medininenet.com/script/main/art.asp?articlekey=14686>; see also Medline Plus, A Service of the U.S. National Library and the National Institute of Health (NIH), Medical Encyclopedia, "Arthritis" at <http://www.nlm.nih.gov/medlineplus/ency/article/001243.htm>.

These articles suggest that arthritis is not caused by climate and that aggravation of pre-existing arthritic conditions is more likely than not caused by fluctuations in humidity and barometric pressure and not temperature changes.² Further, the latter article suggests that

² "It appears that there is some evidence that the symptoms of certain persons with arthritis are influenced by CHANGES in the weather. This is not true for all people with arthritis, nor is it predictable what type of weather alterations will bother people. ... each patient must be evaluated (and evaluate themselves) uniquely. The bottom line is that while the exact cause(s) of the activation of arthritis symptoms may not yet be scientifically understood, each patient must make lifestyle and/or medication adjustments according to the particular weather conditions that they note influence their symptoms. ... It is very important to appreciate that only joint SYMPTOMS (such as pain and stiffness) are influenced by weather. We do not have any evidence that weather changes lead to joint damage. Furthermore, weather changes have not been related to whether or not an individual develops arthritis. Whether Weather Affects Arthritis," by William C. Shiel, Jr., MD, FACP, FACR at <http://www.medininenet.com/script/main/art.asp?articlekey=14686>

arthritic pain is generally treated by over-the-counter medications such as anti-inflammatory drugs, pain-relievers, and various balms containing capsiacin; some therapies even call for treating the affected joint with ice.³

“You may have joint inflammation for a variety of reasons, including:

Broken bone, Infection (usually caused by bacteria or viruses), An autoimmune disease (the body attacks itself because the immune system believes a body part is foreign), General wear and tear on joints. Often, the inflammation goes away after the injury has healed, the disease is treated, or the infection has been cleared.

With some injuries and diseases, the inflammation does not go away or destruction results in long-term pain and deformity. When this happens, you have chronic arthritis. Osteoarthritis is the most common type and is more likely to occur as you age. You may feel it in any of your joints, but most commonly in your hips, knees or fingers. Risk factors for osteoarthritis include: Being overweight, Previously injuring the affected joint, Using the affected joint in a repetitive action that puts stress on the joint (baseball players, ballet dancers, and construction workers are all at risk). Arthritis can occur in men and women of all ages. About 37 million people in America have arthritis of some kind, which is almost 1 out of every 7 people.” Medline Plus, A Service of the U.S. National Library and the National Institute of Health (NIH), Medical Encyclopedia, “Arthritis” at <http://www.nlm.nih.gov/medlineplus/ency/article/001243.htm> #Causes,% 20incidence,% 20and% 20risk% 20factors.

³ “Treatment of arthritis depends on the particular cause, which joints are affected, severity, and how the condition affects your daily activities. Your age and occupation will also be taken into consideration when your doctor works with you to create a treatment plan.

If possible, treatment will focus on eliminating the underlying cause of the arthritis. However, the cause is NOT necessarily curable, as with osteoarthritis and rheumatoid arthritis. Treatment, therefore, aims at reducing your pain and discomfort and preventing further disability.

It is possible to greatly improve your symptoms from osteoarthritis and other long-term types of arthritis without medications. In fact, making lifestyle changes without medications is preferable for osteoarthritis and other forms of joint inflammation. If needed, medications should be used in addition to lifestyle changes.

Exercise for arthritis is necessary to maintain healthy joints, relieve stiffness, reduce pain and fatigue, and improve muscle and bone strength. Your exercise program should be tailored to you as an individual. Work with a physical therapist to design an individualized program, which should include: Range of motion exercises for flexibility, Strength training for muscle tone, Low-impact aerobic activity (also called endurance exercise). A physical therapist can apply heat and cold treatments as needed and fit you for splints or orthotic (straightening) devices to support and align joints. This may be particularly necessary for rheumatoid arthritis. Your physical therapist may also consider water therapy, ice massage, or transcutaneous nerve stimulation (TENS).

Rest is just as important as exercise. Sleeping 8 to 10 hours per night and taking naps during the day can help you recover from a flare-up more quickly and may even help prevent exacerbations. You should also: Avoid positions or movements that place extra stress on your affected joints;

Avoid holding one position for too long; Reduce stress, which can aggravate your symptoms; Try meditation or guided imagery; And talk to your physical therapist about yoga or tai chi.

Modify your home to make activities easier. For example, have grab bars in the shower, the tub, and near the toilet. Other measures to try include: Taking glucosamine and chondroitin -- these form the building blocks of cartilage, the substance that lines joints. These supplements are available at health food stores or supermarkets. Early studies

In other words, there seems to be no scientific evidence to support plaintiff's claim that exposure to cold weather for a few minutes three times per day would "cause" the development of arthritis.

Additionally, the available medical literature suggests that pain associated with arthritis is generally treated by over-the-counter medications and changes in diet and life-style and thus, even if the arthritis symptoms experienced by plaintiff were caused by his exposure to cold weather, the injury thus experienced must be characterized as "*de minimis*" as described above.

Finally, by his own admission, plaintiff was exposed to the cold only for short periods at mealtimes. He was without a jacket for the period beginning January 12, 2005 and ending March 14, 2005. According to the archived meteorological records of the Louisiana Office of State Climatology, the temperature in the region surrounding SLCC went below 40° F on only eleven

indicate that these compounds are safe and may improve your arthritis symptoms. More research is underway.

Eat a diet rich in vitamins and minerals, especially antioxidants like vitamin E. These are found in fruits and vegetables. Get selenium from Brewer's yeast, wheat germ, garlic, whole grains, sunflower seeds, and Brazil nuts. Get omega-3 fatty acids from cold water fish (like salmon, mackerel, and herring), flaxseed, rapeseed (canola) oil, soybeans, soybean oil, pumpkin seeds, and walnuts.

Apply capsaicin cream (derived from hot chili peppers) to the skin over your painful joints. You may feel improvement after applying the cream for 3-7 days.

Your doctor will choose from a variety of medications as needed. Generally, the first drugs to try are available without a prescription. These include:

Acetaminophen (Tylenol) -- recommended by the American College of Rheumatology and the American Geriatrics Society as first-line treatment for osteoarthritis. Take up to 4 grams a day (2 extra-strength Tylenols every 6 hours). This can provide significant relief of arthritis pain without many of the side effects of prescription drugs. DO NOT exceed the recommended doses of acetaminophen or take the drug in combination with large amounts of alcohol. These actions may damage your liver.

Aspirin, ibuprofen, or naproxen -- these anti-inflammatory drugs are often effective in combating arthritis pain. However, they have many potential risks, especially if used for a long time. They should not be taken in any amount without consulting your doctor. The most dangerous side effects are stomach ulcers, bleeding from the digestive tract, and kidney damage. If you have kidney or liver disease, or a history of gastrointestinal bleeding, you should not take these medicines unless your doctor specifically recommends them." *id.*

days during that time period. On those days, the maximum temperature fluctuated between the upper-40's and the upper-60's.⁴ Clearly plaintiff's exposure to the cold, while unfortunate and regrettable, was clearly *de minimis* and any physical injury he sustained thereby was likewise *de minimis*. Therefore, his claims are barred by the provisions of 42 U.S.C. § 1997e(e).

Accordingly,

IT IS AGAIN RECOMMENDED that plaintiff's civil rights complaint be **DISMISSED WITH PREJUDICE** as frivolous and for failing to state a claim on which relief may be granted in accordance with the provisions of 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ.Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

Failure to file written objections to the proposed factual finding and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See

⁴ See <http://www.losc.lsu.edu>. According to data in the Lake Charles regional archives for the months of January, February, and March, 2005, the temperature in the region went below 40° F. on January 14-19, January 23-25; February 5 and 11. The temperature went below freezing on only four days during the relevant time period, January 17-18 and January 23-24. The coldest maximum temperature during the relevant time period occurred on January 23 when the maximum temperature was 47° F.

Douglas v. United Services Automobile Association, 79 F.3d 1415 (5th Cir. 1996).

Signed at Lafayette, Louisiana, on October 7, 2005.

A handwritten signature in black ink, appearing to read 'M. Methvin', written over a horizontal line.

Mildred E. Methvin
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